Filed 8/20/12 P. v. Stewart CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JEREMY STEWART, Defendant and Appellant.	D058538 (Super. Ct. No. SCD226129)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

A jury convicted defendant Jeremy Stewart of two counts of residential burglary. (Pen. Code, §§ 459/460.)[1] In a bifurcated proceeding, Stewart admitted the allegations he had two prior serious felony convictions (§ 667, subd. (a)(1)), two prior strike convictions (§ 667, subds. (b)-(i)), and three prison priors (§ 667.5, subd. (b)). The court sentenced Stewart to a total term of 70 years to life.

1 All further statutory references are to the Penal Code unless otherwise specified.

Stewart alleges (1) the court erroneously admitted a statement written by him; (2) he was deprived of effective assistance of counsel prior to and during trial; (3) there were numerous instructional errors; and (4) the court erred when it denied his motion to dismiss the prior strike conviction allegations under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

I

FACTUAL BACKGROUND

A. The First Burglary

On October 29, 2009, Ann Childre returned home between 1:00 and 1:30 p.m. and found her front door unlocked even though she had locked it before leaving. She quickly determined someone had entered her home while she was gone. She saw the sliding glass patio door was slightly open, and the window in the family room was open with the blinds pulled halfway up. She called 911 and waited outside for officers to arrive.

Police searched and found the upstairs rooms had been ransacked. Childre subsequently determined that approximately $1500 in jewelry was missing. Her jewelry was never recovered.

Police determined the screen to the family room window had been removed. Fingertip prints and a palm print were on the window. The palm print was matched to Stewart.

B. The Second Burglary

On February 25, 2010, Ana Shirey returned to her home on 7784 Melotte Street in San Diego around 1:15 p.m. When she entered her house, she saw the sliding glass doors

in the bedroom were open and the bedroom was a mess. The screen had been popped out of a window and the blinds were halfway up. Shirey ran outside and had a neighbor call police. She kept her expensive jewelry in a box at the bottom of her dresser and her inexpensive jewelry on top of the dresser. More than $20,000 of the expensive jewelry was missing.

Around 10:15 a.m. earlier that day, Arthur Bennett (a caretaker for Shirey's neighbor) encountered a young man in the neighbor's backyard.[2] The young man was walking quickly toward the back sliding glass door. Bennett and the man startled each other, and the young man said, "you must be the guy I am looking for" and "I came to give Wayne a ride." Bennett told him he had the wrong house and perhaps he was looking for the house next door. Bennett watched the man drive a white four-door sedan to the front of Shirey's house and walk up the driveway. Bennett was suspicious and wrote down the car's license plate number.

A detective, in the area investigating an unrelated matter around 10:30 that morning, saw a man sitting in a small, white, four-door sedan parked on the street. He wrote down the license plate number of the car because it was unusual for cars to be parked on the street in that neighborhood. The detective later determined the license plate number he wrote down matched that written down by Bennett.

---

[2] At trial, Bennett said he was "98 percent sure" Stewart was the man he encountered in the backyard, although he had not identified Stewart in a prior photographic lineup.

San Diego Police Officer Brogdon traced the license plate number written down by Bennett to a car registered to Stewart's wife. Brogdon went to Stewart's residence and saw the white sedan parked near Stewart's apartment. Brogdon searched the apartment and found several bags of jewelry, included among which was a bracelet that Shirey believed had been given to her by a friend. Brogdon also seized paper with a list written by Stewart containing certain admissions later introduced at trial. Stewart was not home when Brogdon conducted the search.

Brogdon returned to Stewart's residence on March 11 to arrest Stewart. Stewart was crying and asked if he could kiss his wife and son goodbye.

II

ANALYSIS

A. The Evidentiary Claim

Stewart asserts the trial court abused its discretion when it overruled his objection to the introduction of a written statement, contained on the list seized by police, that stated "I make money by stealing." He asserts the court should have excluded the statement because the prejudicial impact of the statement outweighed its probative value and it was therefore inadmissible under Evidence Code section 352. He also asserts on appeal that it was inadmissible under Evidence Code section 1101.

In Limine Motion

The prosecution moved in limine to admit four specific statements, included in a long list of statements authored by Stewart, on some paper seized during the police search of his home. The four statements were:

> "I make money by stealing."
>
> "I pay over $2,100 a month in bills. Spending averages $11,000.00 per month in all [expenses]."
>
> "Car is not gonna run too much longer."
>
> "I hate myself because I can't lead Rae and I away from this lifestyle."

The prosecutor, noting the document was three pages long and contained 34 numbered items on the list, suggested that rather than redacting the document to obscure most of the statements (including statements that referred to his two-strike status, his prison time, and his being on parole), it would be preferable to have a detective simply read the targeted four statements to avoid having the jury speculate about the other 30 statements.

Defense counsel responded:

> "The document as a whole is very prejudicial. Um, and even some of these statements that, um—that don't deal directly with him being on parole and any of those things, um, they seem to go more towards a motive than, you know—I don't know. I mean, it would seem—redacting it, they're going to wonder what the rest of this says. I think on that face, it's just more prejudicial than probative. They're going to have too many questions about it."

The court then asked defense counsel whether the prosecution's proposed solution—having the detective simply read the specific statements without presenting the physical document to the jury—would cure the defense's concern. Defense counsel responded "[i]f any of it comes in, yes."

The court, after noting the prosecution had submitted a motive instruction that would permit the jury to consider motive when assessing guilt, concluded the first three

statements were indicative of motive and the probative value outweighed "any of the [Evidence Code section] 352 concerns." However, the court noted the last statement was "a little more questionable" because it could refer to drug use, and the court was "inclined to keep that one out." The court ultimately excluded the "lifestyle" statement.

Legal Framework

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." As explained by the court in *People v. Karis* (1988) 46 Cal.3d 612, 638, "[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' "

We review the trial court's rulings under Evidence Code section 352 for an abuse of discretion (*People v. Lewis* (2001) 25 Cal.4th 610, 637) and will not reverse an evidentiary ruling unless Stewart demonstrates a manifest abuse of that discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Importantly, a " ' "failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable. [Citation.]' " (*People v. Partida* (2005) 37 Cal.4th 428, 434.) " 'To require this is simply a matter of fairness and justice, in order that cases may be tried on their merits. Had attention been called directly in the court below to the particular objection which it is now claimed the general objection of appellant presented, that court would have had a concrete legal proposition to pass on, and counsel for plaintiff would have been advised directly what the particular complaint against the question was, and, if he deemed it tenable, could have withdrawn the inquiry or reframed his question to obviate the particular objection. Trial judges are not supposed to have the numerous, varied, and complex rules governing the admissibility of evidence so completely in mind and of such ready application that under an omnivagant objection to a question they can apply with legal accuracy some particular principle of law which the objection does not specifically present.' " (*Id.* at p. 434.)

Analysis

On appeal, Stewart argues the court should have excluded the statement "I make money by stealing" because (1) it was inadmissible under Evidence Code section 1101 and (2) even if admissible under Evidence Code section 1101, the prejudicial impact of the statement outweighed its probative value and it was therefore inadmissible under Evidence Code section 352.

We conclude Stewart's claim of error under Evidence Code section 1101 is not cognizable in this appeal because he did not make a specific objection on that ground in the trial court. (*People v. Partida, supra,* 37 Cal.4th at p. 434.) Although Stewart's

objection arguably invoked an Evidence Code section 352 objection to the statement, he nowhere mentioned any preclusion against "propensity evidence," or cited Evidence Code section 1101 as precluding the evidence. Under these circumstances, that claim may not be raised on appeal. (*People v. Thomas* (1992) 2 Cal.4th 489, 519-520 [objection raising potential § 352 objection is insufficient to preserve claim that evidence was inadmissible under § 1101]; *People v. Partida*, *supra*.)

In contrast, Stewart's objection arguably did preserve his ability to assert the trial court abused its discretion under section 352. However, we conclude Stewart has not demonstrated a manifest abuse of the court's discretion. (*People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10.) The admission by Stewart that "I make money by stealing," when viewed in conjunction with the other statements ("I pay over $2,100 a month in bills" and "Car is not gonna run much longer") evidencing his financial difficulties, was relevant evidence demonstrating he had a motive for engaging in thefts of high value objects. Evidence of uncharged misconduct is generally inadmissible to show bad character or criminal disposition, but it may be admitted to prove some material fact at issue, such as motive, intent, knowledge, or identity. (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) After a trial court determines the misconduct evidence is relevant, it must then undertake an evaluation under Evidence Code section 352 to determine whether the probative value is substantial and not outweighed by the probability that the evidence would be unduly prejudicial, confusing, or misleading to the jury. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

Motive is an intermediate fact that may be probative of the ultimate issue of identity. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017-1018; *People v. Morales* (1979) 88 Cal.App.3d 259, 264.) The courts have on several occasions addressed the relevancy of uncharged misconduct evidence to prove motive to commit the charged offenses. For example, it is well established that drug addiction evidence is admissible to show motive when the direct object of the charged offense is to obtain drugs—for example, in cases charging forgery of a drug prescription or burglary of a drugstore to steal narcotics. (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 906; *Morales*, at p. 264.) In contrast, where there was *no* connection between the drug addiction evidence and a charged theft-related offense, our Supreme Court has held that the inflammatory effect of the evidence outweighed its remote probative value on the issue of motive. (*Cardenas*, at pp. 903, 906-907 [testimony by witnesses that defendant was a drug addict inadmissible to prove financial motive to rob store].) However, subsequent to its decision in *Cardenas*, our Supreme Court in *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1209, emphasized the import of the *Cardenas* holding is that drug addiction evidence should not be admitted if it is only *remotely* relevant to the material issues in the case. The *Gonzalez* court explained: "[In *Cardenas*] the issue was whether the accused was the perpetrator of a 7-Eleven robbery. To buttress the theory that Cardenas was the robber, the prosecution sought to prove he needed money to support his drug habit. We confirmed that because of its prejudicial impact, an accused's addiction to narcotics may not be admitted as *remote evidence* of his motive for stealing something other than drugs. [Citations.] Otherwise, every addict charged with robbery or theft would face exposure

to the jury of his 'loath[some]' character flaw." (*Ibid.*, italics added.) The *Gonzalez* court concluded the *Cardenas* rule did not apply in the case before it because the defendant had admitted a shooting but claimed mistaken self-defense, thus rendering narcotics-related evidence "more than 'remotely' relevant" to various issues pertaining to the defendant's state of mind. (*Ibid.*)

Consistent with the holding in *Gonzalez,* in *People v. Felix* (1994) 23 Cal.App.4th 1385, 1392-1394, the court distinguished the circumstances before it from those in *Cardenas,* because there was "direct probative evidence establishing motive" rather than the remote or insignificant evidence of motive ruled inadmissible in *Cardenas.* In *Felix,* a detective testified the defendant stated during an interview that he had burglarized his sister's home to steal something and to buy heroin with the proceeds from the sale. (*Felix,* at p. 1392.) The *Felix* court concluded that because the defendant's own statements showed a direct connection between the charged burglary of his sister's residence and his drug use, the drug addiction evidence directly proved motive for the burglary and was therefore properly admitted. (*Id.* at pp. 1393-1394.)

Here, the uncharged misconduct evidence described Stewart's admissions as to his need for money and how he satisfied that need. The evidence was relevant to show his motive to commit theft offenses: during the time of the burglaries, he was desperate for money; and he was committing theft-related offenses to satisfy that need. This evidence was highly probative to prove Stewart had a motive to commit the offenses. Under these circumstances, the court did not abuse its discretion in finding the evidence relevant to show his motive to commit the charged offenses.

We are not persuaded by Stewart's argument that admission of the uncharged misconduct evidence was an abuse of discretion because it was cumulative. (See, e.g., *People v. Kipp, supra*, 18 Cal.4th at p. 372.) Although there was evidence placing Stewart at the scene of both burglaries, there was no direct evidence placing him inside the homes of the victims. The uncharged misconduct evidence, which supported an inference that Stewart was the perpetrator because he had a motive to commit the offenses, was relevant to support the circumstantial evidence, and the trial court was not required to exclude the uncharged misconduct evidence as merely cumulative.

B. The Ineffective Assistance of Counsel Claims

Stewart argues he was deprived of effective assistance of counsel because of two omissions: counsel did not object to the admission into evidence of the jewelry found in his home not specifically connected to the charged offenses, and did not move to sever trial of the two burglary charges.

Legal Framework

Because the underlying predicate for this set of appellate contentions asserts Stewart's trial counsel was ineffective, we briefly outline the standards relevant to these claims. To establish ineffective assistance of counsel, Stewart bears the burden of showing both that counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and that it is reasonably probable the verdict would have been more favorable to him absent counsel's deficiency. (See, e.g., *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in

making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) Counsel is not ineffective for not objecting or bringing a motion where the action would be futile. (*People v. Hines* (1997) 15 Cal.4th 997, 1038, fn. 5.)

We will reverse on the ground of ineffective assistance of counsel " 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) Furthermore, in an appropriate case, we may reject an ineffectiveness claim on the ground of lack of prejudice without first determining whether counsel's performance was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

The Evidence Claim

Police searched Stewart's home on March 3, 2010, while he was not present, and seized numerous items of jewelry. Shirey, who had been burglarized less than a week earlier, believed that one of the items seized that day by police (a Guess bracelet) belonged to her. Police seized other items, including some gold bracelets, rings, chains and other jewelry. Although neither victim identified the other jewelry as belonging to them, these items were admitted into evidence without defense objection.

Police searched Stewart's home again on March 11, 2010, and found another trove of jewelry, including a bag filled with cut-up gold. Again, although neither victim identified the other jewelry as belonging to them, the items were admitted into evidence without defense objection.

Stewart asserts counsel was ineffective for not objecting to the introduction of all of the jewelry (except for the Guess Bracelet) because it had no relevance to his guilt on the charged offenses, and it was prejudicial because it permitted an inference he had a propensity to commit thefts. Certainly, some courts have concluded it is error to admit physical evidence unconnected with the charged offenses when (1) it has no relevance to the charged offenses and (2) it has the potential of prejudicing the defendant by showing he had a propensity to commit crimes similar to the charged offenses. (See, e.g., *People v. Archer* (2000) 82 Cal.App.4th 1380, 1394; *People v. Henderson* (1976) 58 Cal.App.3d 349, 360; cf. *People v. Witt* (1958) 159 Cal.App.2d 492, 497.) However, the jewelry here was relevant and admissible, and counsel was therefore not ineffective for not objecting to its admission, for several reasons. First, Stewart's closing argument asserted there was "a complete lack of direct evidence" tying him to the burglaries, and the fact Childre's jewelry was not found in Stewart's possession provided some evidentiary basis for that argument. However, the fact the *other* jewelry introduced at trial included jewelry that had stones removed or had been cut up permitted an inference that Stewart quickly sold or melted down the jewelry he obtained, and that the same fate had befallen Childre's jewelry stolen many months earlier, and therefore was relevant to undermine an effort to argue innocence based on the absence of Childre's jewelry from his possession.

Second, the jewelry was relevant to prove Stewart's modus operandi. In the Shirey burglary, to which Stewart was tied by evidence of his proximity to the victim's house during the break-in and by his possession of the Guess bracelet, the prosecution showed Stewart used a specific modus operandi: the burglar struck during the midmorning hours;

he targeted a single family structure; he used the sliding glass doors for ingress or egress; he left the blinds on a window halfway open; and *he apparently targeted only noncostume jewelry*. The prosecution showed the same modus operandi had been employed for the Childres burglary. Stewart's possession of a trove of noncostume jewelry, of a type stolen from both homes by a person using the same modus operandi, was relevant to provide an additional basis from which a rational trier of fact could infer Stewart was the perpetrator of the Childres burglary. Because the jewelry was probative, both of the identity of the burglar and to explain the absence of any of Childres's pieces from Stewart's possession, counsel was not ineffective for not making a relevance objection to the introduction into evidence of the jewelry.

The Severance Claim

Stewart also asserts counsel was ineffective for not moving to sever the two burglary charges for trial. However, a trial counsel is not ineffective for not bringing a motion where the motion would be futile (*People v. Hines, supra,* 15 Cal.4th at p. 1038, fn. 5), and we are convinced under the applicable law that a motion to sever would have been futile.

Under section 954, "[a]n accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." Courts have interpreted the term "same class of crimes

or offenses" in section 954 broadly to refer to offenses that possess common characteristics or attributes (see, e.g., *People v. Grant* (2003) 113 Cal.App.4th 579, 586 [counts of burglary, concealing stolen property, and possession of property with a removed serial number were properly joined as crimes against property]) and Stewart does not dispute the charges here prima facie qualified for joinder under section 954.

In *People v. Soper* (2009) 45 Cal.4th 759, the California Supreme Court addressed the legal principles relevant to severance of properly joined criminal charges. (*Id*. at pp. 771-772.) In this context, the prosecution is entitled to join offenses, and the burden is on the party seeking severance to *clearly establish* there is substantial danger of prejudice, requiring the charges be separately tried. (*Id*. at p. 773.) " ' "[A] party seeking severance must make a *stronger* showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." ' " (*Id*. at p. 774.) The defendant must deal with the countervailing considerations of conservation of judicial resources and public funds, considerations that often weigh strongly against severance of properly joined charges. (*Ibid*.)

Importantly, *Soper* began its analysis by examining "the cross-admissibility of the evidence in hypothetical separate trials. [Citation.] If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges. [Citation.] Moreover, even if the evidence underlying these charges would *not* be cross-admissible in hypothetical separate trials, that determination would not itself establish prejudice or an abuse of discretion by the trial court in declining to

sever properly joined charges." (*People v. Soper, supra,* 45 Cal.4th at pp. 774-775.) Only where a court determines that evidence underlying properly joined charges would not be cross-admissible does it next consider " 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' [Citations.] In making *that* assessment, we consider three additional factors, any of which—combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state." (*Id.* at p. 775, fn. omitted.)

Here, Stewart's argument falters on the first step, because we are convinced the evidence of each burglary would have been cross-admissible in a separate trial of the other burglary, and therefore it would have been futile to move for severance. When assessing cross-admissibility of evidence on the issue of identity, a modus operandi sharing distinctive marks is sufficient to warrant cross-admission. (*People v. Miller* (1990) 50 Cal.3d 954, 987.) "The inference of identity . . . need not depend on one or more unique or nearly unique common features; features of substantial but lesser

distinctiveness may yield a distinctive combination when considered together." (*Ibid*.) Here, the burglar struck during the midmorning hours; he targeted single family structures; he used the sliding glass doors for ingress or egress; he left the blinds on a window halfway up; and he targeted only noncostume jewelry. Moreover, Stewart was in proximity to both burglarized homes, as evidenced by the palm print found at the first burglary and the license plate at the second burglary, which buttresses the cross-admissibility of the evidence. (Cf. *People v. Carpenter* (1997) 15 Cal.4th 312, 361-362 [ballistics evidence showing same gun used in both offenses was alone probably sufficient for cross-admissibility].) We are not persuaded by Stewart's claim that counsel was ineffective for not moving to sever the two burglary charges.

C. The CALCRIM No. 359 Claims

Stewart argues the court erred by instructing the jury with CALCRIM No. 359 because it was inapplicable to this case, and also erred by giving a prejudicially misleading oral recap of the instruction.

Background

During the discussion of jury instructions, the court informed the parties it intended to give CALCRIM No. 359. Stewart did not object or request any modification of the instruction. When orally instructing the jury, the court stated: "[Stewart] may not be convicted . . . based on his out-of-court statements alone. And you may rely on those statements to convict him only after you find and conclude that there is other evidence showing that the alleged crime separately charged in each of the counts was committed. The other evidence need only be slight, need only be enough to support a reasonable

inference that the crime was committed. The identity of the perpetrator of a crime is not literally itself an element of the crime. And the degree of the crime may be proved by his statements alone. But, again, the ever present bottom line, you cannot convict him . . . unless the proof convinces you beyond a reasonable doubt." Stewart raised no objection to this oral recap of the corpus delicti instruction.

Stewart's Challenge to CALCRIM No. 359

CALCRM No. 358 instructs the jury on how to consider evidence of a defendant's out-of-court statements, and CALCRIM No. 359 instructs the jury on corpus delicti by instructing that a defendant may not be convicted of a crime based *solely* on his or her out-of-court statements and there must be some other evidence showing the crime was committed.[3] Stewart argues the latter instruction impermissibly lessened the prosecution's burden of proof on the issue of identity.[4]

---

3 Giving *both* CALCRIM Nos. 358 and 359 is mandated by the use notes to CALCRIM No. 359, which states the instruction must always be given with CALCRIM No. 358. As given in written form, CALCRIM No. 358 instructed the jury, "You have heard evidence that the defendant made . . . oral or written statement[s] before the trial. You must decide whether or not the defendant made any [of these] statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. [¶] Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded."

4 The People argue Stewart waived this argument because he did not object to the instructions below. Although this assertion appears meritorious, we have discretion to consider the arguments nonetheless (§ 1259), and do so to preempt an ineffective assistance of counsel claim. (*People v. Osband* (1996) 13 Cal.4th 622, 693.)

As given in its written form to the jury, CALCRIM No. 359 instructed: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

Stewart argues the primary issue in this case was identity, that his identity as the perpetrator must be proven beyond a reasonable doubt, and that his out-of-court statements were part of the proof of his identity. He then isolates the sentence, "The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statement alone," from the rest of CALCRIM No. 359 to argue the instruction somehow reduced the burden of proof on the issue of identity by creating an improper permissive inference allowing the jury to infer his identity solely from his out-of-court statements.

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) We evaluate whether an instruction is misleading by

reviewing the jury charge as a whole. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) " ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) "An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*Campos,* at p. 1237.)

CALCRIM No. 359 correctly expresses the corpus delicti rule. (*People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498.) Under this rule, "every *conviction* must be supported by some proof of the corpus delicti *aside from* or *in addition to* [defendant's extrajudicial] statements, and . . . the jury must be so instructed." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165.) The corpus delicti is established when it is shown that a crime has been committed by someone, and the rule consists of two elements: (1) the injury or harm; and (2) a criminal agency causing that harm to exist. (*People v. Zapien, supra,* 4 Cal.4th at pp. 985-986.) The purpose of the corpus delicti rule is to assure that an accused does not admit to a crime that never occurred, and the rule is satisfied by a " 'slight' " quantum of proof. (*People v. Jennings* (1991) 53 Cal.3d 334, 368.)

Stewart's argument, relying on *Francis v. Franklin* (1985) 471 U.S. 307 and *People v. Beltran* (2007) 157 Cal.App.4th 235, asserts the effect of CALCRIM No. 359 improperly reduced the burden of proof on essential aspects of the prosecution's case. However, this argument is premised on an erroneous assumption that *identity* is part of the corpus delicti. " 'Proof of the corpus delicti does not require proof of the identity of

the perpetrators of the crime, nor proof that the crime was committed by the defendant.' " (*People v. McNorton* (2011) 91 Cal.App.4th Supp. 1, 6.) There is no bar that precludes proving the *identity* of the perpetrator by a defendant's out-of-court statements alone.

Stewart's reliance on *Francis v. Franklin, supra,* 471 U.S. 307 and *People v. Beltran, supra,* 157 Cal.App.4th 235 is misplaced. *Francis* found constitutionally infirm instructions that created a rebuttable presumption as to an element of the crime (e.g., intent) from proof of other elements of the crime. (*Francis,* at pp. 315-316.) *Beltran* found a permissive inference as to an element of the offense could raise similar constitutional infirmities. (*Beltran,* at pp. 244-245.) CALCRIM No. 359 contains no analogous direction.

Moreover, we disagree that CALCRIM No. 359's correct statement of the law—the identity of the perpetrator may be proved by extrajudicial statements alone—reduced the prosecution's burden of proof on identity to less than guilt beyond a reasonable doubt. CALCRIM No. 359 merely constitutes a statement that the corpus delicti rule does not preclude reliance on the defendant's out-of-court statements to prove identity beyond a reasonable doubt. Moreover, the instructions must be read as a whole. The court instructed the jury with CALCRIM No. 220, which defines reasonable doubt, informs the jury that it must consider all the evidence, and instructs the jury the defendant is entitled to an acquittal unless the evidence proves him guilty beyond a reasonable doubt. CALCRIM No. 359 reiterated that the jury could "not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." Reasonable jurors would have understood from the entirety of the charge that the prosecution was required

to prove identity beyond a reasonable doubt after examination of all the evidence. We conclude CALCRIM No. 359 was not misleading and did not reduce the prosecution's burden of proof on identity.

Stewart's Challenge to Trial Court's Oral Recap of the Corpus Delicti Instruction

Stewart argues the trial court prejudicially misled the jury because, when it orally instructed the jury, it stated: "[Stewart] may not be convicted . . . based on his out-of-court statements alone. . . . *The identity of the perpetrator of a crime is not literally itself an element of the crime*. And the degree of the crime may be proved by his statements alone. But, again, the ever present bottom line, you cannot convict him . . . unless the proof convinces you beyond a reasonable doubt." Stewart suggests the italicized language, read in the context of other instructions that stated nonelements of the crimes did not need to be proven beyond a reasonable doubt, suggested the prosecution did not need to prove beyond a reasonable doubt that Stewart was the perpetrator of the burglaries.

We are not persuaded by Stewart's convoluted interpretation of the italicized language, for several reasons. First, he did not object to any purported ambiguity created by the italicized language, and therefore has waived the issue. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Second, the italicized language is not an *incorrect* statement of the law in the context of the corpus delicti instruction. (*People v. Miranda* (2008) 161 Cal.App.4th 98, 107-108.) Third, to the extent any conflict existed between the written instruction and the oral version, we presume that jurors understand and follow the court's instructions, including the written instructions, and to the extent a discrepancy exists

between the written and oral versions of jury instructions, the written instructions provided to the jury will control our evaluation. (*People v. Mills* (2010) 48 Cal.4th 158, 200-201.) Because the written instructions here are adequate, we find no reversible error. Finally, Stewart's argument asserts the reasonable jury would have understood the italicized language as instructing that the jury could convict Stewart even though his identity as the perpetrator was not proven beyond a reasonable doubt, despite the fact the italicized language was *immediately* followed by the court's statement that "again, the ever present bottom line, you cannot convict him . . . unless the proof convinces you beyond a reasonable doubt." Under these circumstances, we reject Stewart's claim the oral version likely was understood in a constitutionally infirm manner.

D. The CALCRIM No. 376 Claims

Relevant to the charged burglaries, the trial court instructed the jury with CALCRIM No. 376 as follows:

> "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of Burglary based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed Burglary.
>
> "The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of Burglary.
>
> "Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

Stewart argues the instruction violated his constitutional rights by lessening the People's burden to prove guilt beyond a reasonable doubt. To the extent Stewart's instructional argument concerns his constitutional rights, we reject the People's forfeiture argument based on defense counsel's failure to object to the instruction. (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574.)

Stewart contends instructing the jury that only "slight" supporting evidence was needed to convict based on a defendant's possession of recently stolen property created a "de facto permissive inference" that somehow reduced the level of proof below the constitutional standard of proof beyond a reasonable doubt. However, analogous arguments were rejected in *People v. Gamache* (2010) 48 Cal.4th 347, 375, in which the court explained that CALCRIM No. 376 benefits the defendant by "emphasiz[ing] that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.] In the presence of at least some corroborating evidence, it permits—but does not require—jurors to infer [guilt] from possession of stolen property . . . ." (Accord, *People v. Najera* (2008) 43 Cal.4th 1132, 1138 [mere possession of recently stolen property is insufficient for guilt because "there may be an innocent explanation for the circumstance of possession"].) Stewart's argument—that the instruction tells the jury possession of stolen property creates a permissive inference of guilt and the jury should then utilize the slight corroboration standard to find guilt—misreads the instruction. CALCRIM No. 376 does not state this. It tells the jury possession alone is not sufficient to support guilt, and the jury may find guilt based on this evidence only if it is supported by at least some slight corroborating evidence. The

instruction does not tell the jury the possession evidence creates a strong inference of guilt, slight evidence is sufficient to convict, or that it should ignore the other relevant evidence. The instruction merely cautions the jury that more than mere possession is needed to convict.[5]

Stewart contends the instruction improperly pinpoints prosecution evidence because it implies what conclusion to draw from the evidence. This contention is likewise unavailing. Pinpoint instructions are improper if they are "argumentative instructions that imply certain conclusions from specified evidence." (*People v. Yeoman* (2003) 31 Cal.4th 93, 131.) In *Yeoman*, the court concluded the possession of stolen property instruction "has a proper purpose rather than [an improper] argumentative purpose" because it "informs the jury that conscious possession of recently stolen property is insufficient, without corroboration, to sustain a conviction." (*Ibid*.) The *Yeoman* court reasoned, " 'If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence. ' " (*Ibid*.)

---

5 Stewart also asserts the instruction was misleading because, although his possession of the Guess bracelet supported the instruction, his possession of other jewelry *not* stolen during the charged offenses could have been improperly used by the jury to infer guilt. However, when an instruction is a correct statement of the law but a defendant claims it should be modified or refined to fit the particular facts, he or she must raise that claim below or it is waived. (See generally *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142-1143; *People v. Daya* (1994) 29 Cal.App.4th 697, 714.) Stewart raised no objection or request for modification below, and this argument is therefore waived.

Moreover, although the instruction directs the jury's attention to possible evidence showing the defendant's possession of stolen property, it does not suggest the jury should convict based on the evidence of possession in combination with slight corroborating evidence of guilt. The instruction merely tells the jury that it "may" convict based on the possession evidence if guilt is corroborated by other evidence and if guilt is proven beyond a reasonable doubt. (CALCRIM No. 376; see *People v. Gamache, supra*, 48 Cal.4th at p. 375; *People v. Yeoman, supra*, 31 Cal.4th at p. 131; *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1226 [instruction concerning possession of stolen property creates permissive, not mandatory, inference of guilt based on possession plus corroborating evidence].) The instruction is not argumentative in favor of the prosecution, but rather is cautionary in favor of the defendant. (See *People v. Yeoman, supra*, 31 Cal.4th at p. 131.)

E. Cumulative Error

Stewart contends that the cumulative prejudicial effect of his asserted trial court errors requires reversal of the judgment even if the prejudicial effect of the errors considered separately do not. Because we conclude there were no errors we do not consider this argument.

F. The Sentencing Claim

Stewart asserts the trial court erred when it refused to dismiss Stewart's prior strike conviction allegations because (1) it misunderstood the full scope of its authority to dismiss prior strike conviction allegations, (2) it based its refusal to dismiss in part on an

incorrect fact, and (3) it based its refusal to dismiss in part on an impermissible consideration.

Background

After the jury convicted him of the two charged burglaries, Stewart admitted and the court found true that he had suffered two prior strike convictions within the meaning of the three strikes law. At sentencing, Stewart moved to dismiss the prior strike allegations under *Romero, supra*, 13 Cal.4th 497. After considering Stewart's arguments, as well as the arguments in opposition by the People, the court denied the motion.

General Legal Principles

In *Romero*, our Supreme Court held section 1385, subdivision (a), permits a court acting on its own motion to dismiss prior felony conviction allegations in cases brought under the three strikes law. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) *Romero* emphasized that "[a] court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385[, subdivision] (a), and is subject to review for abuse." (*Id.* at p. 530.) Although the Legislature has not defined the phrase "in furtherance of justice" contained in section 1385, subdivision (a), *Romero* held this language requires a court to consider both the constitutional rights of the defendant and the interests of society represented by the People in determining whether to strike a prior felony conviction allegation. (*Romero*, at p. 530.)

In *People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*), our Supreme Court further defined the standard for dismissing a strike "in furtherance of justice" by requiring

that the defendant be deemed "outside" the "spirit" of the three strikes law before a strike is dismissed: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the [t]hree [s]trikes law, on its own motion, 'in furtherance of justice' pursuant to . . . section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

A trial court's decision not to dismiss a prior conviction allegation under section 1385 is reviewed under "the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 371.) *Carmony* explained that when reviewing a decision under that standard, an appellate court is guided "by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' " decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its

discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376-377.)

Analysis

Stewart, noting a court can abuse its discretion when it "consider[s] impermissible factors in declining to dismiss" (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378), first argues the court violated this proscription by denying his motion to dismiss based in part on the court's belief that Stewart acted irresponsibly by fathering children. He argues that, because a court cannot infringe on the exercise of the fundamental right to procreate, denying his motion to dismiss based on his fathering of children was an abuse of discretion. However, this argument is based on a skewed reading of the record. The court denied the motion to dismiss a strike because it concluded this was not an unusual case, and Stewart was not outside the spirit of the three strikes law, because the crimes were serious and Stewart's prior record placed him "right in the midstream of the intended legislation." The comments cited by Stewart to support his claim were made in response to his request that one of the strikes be dismissed so that he could "be there as a presence . . . in the lives of his two young children." The court observed that, even if the motion to dismiss a strike was granted, Stewart would still be subject to a term in excess of 20 years, and therefore "under the best of scenarios, he's not going to be present . . . for the formative years of their lives." The court, while expressing sympathy for Stewart's children, noted Stewart "can't use his children now as a basis for showing any—I have no sympathy for [Stewart]. . . . [H]e created that situation and he's going to have to live with it. . . . [¶] . . . [¶] [I]t was the height of . . . self-centered irresponsibility to even create

those children when he was in the position he is in his life. I think it was outrageous." Viewed in the context of the court's entire ruling, the court's comments did not deny the motion to dismiss *because* Stewart chose to have children, but instead merely rejected Stewart's argument that his election to have children should serve as a basis for *granting* clemency.

Stewart also asserts the court abused its discretion when ruling on the motion because its refusal to dismiss was based in part on an incorrect fact. Certainly, there is authority that a refusal to dismiss a strike can be reversed for an abuse of discretion "when the factual findings critical to [the trial court's decision] find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) Stewart notes that, in this case, the trial court (when discussing the nature of the offenses) observed the crimes were "genuine, bona fide residential burglaries. [In] [o]ne case, of course, unfortunately the resident was present. So it's not a case that these are technically residential burglaries, they are full-blown, full-impact residential burglaries." He asserts, and the People concede, that neither victim was home when Stewart burglarized the residence, and therefore the italicized comment was factually flawed. However, Stewart made no effort to correct this error, or otherwise objected to the court's statement, and we are convinced any claim of error must be deemed waived.

In *People v. Scott* (1994) 9 Cal.4th 331, 352-356, the court placed limitations on the cognizability of certain sentencing decisions. In *Scott*, the court distinguished between unauthorized sentences—those that "could not lawfully be imposed under any circumstances in the particular case" (*Id.* at p. 354)—and discretionary sentencing

choices—those "which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Ibid*.) As to the former, lack of objection does not foreclose review: "We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation] and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*People v. Smith* (2001) 24 Cal.4th 849, 852.) With respect to the latter, however, the general forfeiture doctrine *does* apply and failure to timely object forfeits review. Such "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Scott*, at p. 353.) Because Stewart made no objection to the court's statement of its reasons, we conclude it may not be raised as a basis for reversal on appeal.[6]

Stewart finally asserts the trial court was mistaken about the "full scope" of its discretion because it mistakenly believed (1) it could not consider Stewart's drug addiction as a mitigating factor, and (2) it could not consider the length of Stewart's sentence if it did not grant the motion. Neither claim has merit because both claims are

---

6 Even were the claim preserved, we would conclude the error was de minimus and was not a factual finding so "critical" to the trial court's decision (*People v. Cluff, supra*, 87 Cal.App.4th at p. 998) that remand would be necessary. The important finding was that these were "genuine, bona fide residential burglaries . . . [s]o it's not a case that these are technically residential burglaries, they are full-blown, full-impact residential burglaries." This finding *was* supported by the evidence, regardless of whether it was untrue that someone was present when Stewart broke in.

based on a misreading of the trial court's comments. Regarding Stewart's drug addiction, the court did not indicate it believed it was *required to ignore* Stewart's drug addiction; instead, it merely stated it did not believe Stewart's drug addiction was a factor placing him outside the spirit of the three strikes law.[7] Regarding the sentence length, the court did not indicate it believed it was *required to ignore* the severity of the sentence if it declined to dismiss a strike. Instead, the trial court, consistent with applicable law, stated that "in the *Romero* case itself, the court expressly stated that it's not a proper, reasonable, rational basis for the court exercising discretion to strike a prior that the court may think . . . there's some sympathy for the defendant . . . or not be entirely happy with the resulting sentence which . . . will apply . . . in a particular case if the court follows the law." In context, the court's comments appear intended to convey its recognition that a court may not dismiss a strike merely because it might hold " ' "a personal antipathy for the effect that the three strikes law would have on [a] defendant," while ignoring the "defendant's background," "the nature of his present offenses," and "other individualized considerations." ' " (*People v. Garcia* (1999) 20 Cal.4th 490, 498.) The court considered all of these factors and concluded Stewart did not present an unusual case and was not

---

7 The court, after noting *Romero* required the court to articulate reasons for finding Stewart's case to be an unusual case warranting the dismissal of a strike, stated "in terms of an unusual case, it's a sad commentary I think on the present state of our society that [Stewart] is . . . wrestling with the demons of his addiction, [but] that doesn't make it an unusual case. [¶] Most of the people in custody . . . have an addiction problem. That plays a part in 80 to 90 percent of the cases that go through the justice system. So how can you say that's an unusual case?" Thus, rather than ignoring Stewart's drug addiction, the court examined it but concluded it did not make his case an unusual one.

outside the spirit of the three strikes law. We therefore reject Stewart's claim that the court misunderstood the scope of discretion it had been asked to exercise.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.